STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 8, 2005
v	No. 255259 Wayne Circuit Court
DEANDRE DESHAUN KNIGHT, Defendant-Appellant.	LC No. 03-011173-01

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of kidnapping, MCL 750.349, third-degree fleeing and eluding a police officer, MCL 257.602a(3), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a third-habitual offender, MCL 769.11, to concurrent sentences of seven to fifteen years' imprisonment for kidnapping, three to five years' imprisonment for third-degree fleeing and eluding a police officer, three to five years' imprisonment for felon in possession of a firearm, and a consecutive sentence of two years for felony-firearm. We affirm.

I. Other Acts Evidence

Defendant first argues the trial court erred when it denied defendant's pretrial motion to admit other acts evidence. We disagree. We review a lower court's denial of a motion to admit other acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists where an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Rice* (*On Remand*), 235 Mich App 429, 439; 597 NW2d 843 (1999).

In his motion, defendant sought to admit the testimony of Alonzona Wise and Samuel Ross.[1] Defendant asserted that his testimony and that which would be offered by Wise and Ross

[1] During the hearing on the motion, defense counsel only identified Ross as a potential witness. Regardless, the substance of the proposed testimony is the focus of our analysis, and not the (continued…)

was sufficient to infer a plan, scheme, or system of the complainant's in doing an act. The plan, scheme, or system was identified as stealing items from men with whom she was exchanging sex for drugs or money. On appeal, defendant argues that the other acts evidence was relevant to defendant's theory of defense because it showed the complainant had a plan, scheme, or system of accusing men of criminal behavior after she herself had stolen things from them. This identified system or pattern, defendant argues, supports the defense theory that the complainant was falsely accusing defendant.

MRE 404(b)(1) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), our Supreme Court annunciated the proper analysis for evaluating the admissibility of other acts evidence. First, the evidence must be offered for a proper purpose under MRE 404(b); second, the evidence must be relevant under MRE 402 as enforced through MRE 104(b); third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403; fourth, the trial court may, on request, provide a limiting instruction under MRE 105.

While defendant has articulated a proper purpose for the evidence (common scheme, plan, or system), he fails to show how it is relevant. Evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable that it would be without the evidence. MRE 401. Whether a false accusation has been made is a fact of consequence. In *People v Sabin* (*After Remand*), 463 Mich 43, 63-64 n 10; 614 NW2d 888 (2000), our Supreme Court observed that similar conduct is logically relevant where it is "sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Id*. at 63. *Sabin* explains that the intermediate inference is "that the defendant used that system in committing the charged act as proof that the charged act occurred." *Id*. at 64 n 10. Adapting this rule for the purposes articulated by the defendant, the other acts evidence related to the complainant would be relevant if it was offered to show that the complainant used the common system in making a false accusation.

Defendant never argued below, however, that he was offering the evidence to show that the complainant had a plan or system of stealing from men with whom she was having sex and then making false accusations against them. Further, defendant's offer of proof at the time did not articulate a theory that the potential testimony would establish defendant as a victim of false

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(…continued)

number of witnesses proffered.

accusation by the complainant. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to introduce other acts evidence.

II. Right of Confrontation

Defendant also argues that his right of confrontation[2] was improperly curtailed when the trial court denied his motion to admit other acts evidence. Specifically, defendant argues that his ability to effectively cross-examine the complainant was undermined by the ruling.[3] Defendant did not assert below that his right to confront witnesses was curtailed, and therefore this issue is forfeited. *People v Carines*, 460 Mich 750, 762 n7; 597 NW 2d 130 (1999). We review unpreserved constitutional claims for plain error affecting substantial rights. *Carines*, *supra* at 763.

Defendant's claim of error regarding his right of confrontation is based on a false premise. Regardless of the court's ruling on the other acts motion, defendant could have attempted to impeach the complainant's credibility under MRE 608(b). MRE 608(b) provides in relevant part as follows:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness . . . . [MRE 608(b).]

Once the complaint testified at trial, her credibility became a fact of consequence at trial. MRE 401; Imwinkelreid, Evidentiary Distinctions (1993), p 91. Even though defendant was not permitted to call other acts witnesses, defendant could have pursued the same issue on cross-examination of the complainant. Defendant's failure to do so should not be attributed to the trial court, which was never given an opportunity to rule on the propriety of such a line of inquiry. Accordingly, defendant fails to establish plain error with respect to his right to confront his accuser. *Carines*, *supra*.

III. Undisclosed Witness

Defendant also argues that the trial court erred in allowing the testimony of a witness, an off duty police officer who was a neighbor of the complainant, because this witness was not on

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[2] US Const, Am VI; Const 1963, art 1 § 20.

[3] The right of confrontation includes the requirement that a witness "'submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth."'" *Maryland v Craig*, 497 US 836, 845; 110 S Ct 3157; 111 L Ed 2d 666 (1990), quoting *California v Green*, 399 US 149, 158; 90 S Ct 1930; 26 L Ed 2d 489 (1970), quoting 5 Wigmore, Evidence (3d ed), § 1367.

plaintiff's list of witnesses it intended to produce at trial. MCL 767.40a(3). We disagree. We review a trial court's ruling that permits a party to call a witness not disclosed on its witness list for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW 2d 813 (1995). The complainant testified at trial that she ran up to someone in the neighborhood after escaping from defendant's car. The witness challenged by defendant testified that on the day in issue, the complainant ran up to her screaming and claiming that she had been the victim of an attempted rape. During opening statements, apparently in reliance on the fact that the witness had not been endorsed, defendant asserted that the complainant made no such statements to any witness and that the witness did not even exist.

MCL 767.40a(3) provides that "[n]ot less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial." Plaintiff's final witness list does not include the witness in issue.

However, MCL 767.40a(4) provides that "[t]he prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." Good cause existed to allow the plaintiff to add the witness in the midst of trial. Defendant was clearly aware of the existence of the witness because at the preliminary examination, the complainant testified on cross-examination that after she escaped from defendant's vehicle, she "ran to a neighbor." She explained that "there was this guy and a lady standing outside and there was another lady in the house, and I guess she was a cop or undercover cop or something like that, and she was on the phone with the police." We find no abuse of discretion in the trial court's decision to permit the plaintiff to add this witness in order to demonstrate that the complainant's preliminary examination and trial testimony was not a fabrication, and that in fact she did speak to neighbors shortly after being held captive by the defendant.

IV. Ineffective Assistance Counsel

Defendant raises several claims of ineffective assistance of counsel. Whether a person has been denied the effective assistance of counsel is a mixed question of fact and law. This Court reviews a trial court's factual findings for clear error and questions of law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2s 246 (2002). Because no *Ginther*[4] hearing was held, this Court's review of the relevant facts is limited to mistakes apparent on the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Effective assistance of counsel is presumed and defendant bears a heavy burden to overcome this presumption. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish a claim for ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficiency prejudiced the defendant. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed2d 674 (1984); accord *People v Pickens*,

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

446 Mich 298, 302-303; 21 NW2d 797 (1994). Counsel's performance is deficient where it falls below an objective standard of reasonableness. *Pickens*, *supra* at 443. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland, supra* at 694; accord *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A reasonable probability is "a probability sufficient to undermine the confidence in the outcome." *Strickland*, *supra* at 694. In the process of establishing a claim, defendant must overcome the strong presumption that counsel's decisions constituted sound trial strategies. *Id*. at 689; accord *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The burden is on defendant to establish the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant argues that counsel was ineffective for failing to adequately investigate his claim that a witness might have seen the complainant voluntarily enter defendant's car. We disagree. Failure to investigate can amount to ineffective assistance of counsel if it undermines the confidence in the trial's outcome. *People v Grant*, 470 Mich 477, 494; 684 NW2d 686 (2004). However, even when defendant moved for a new trial or a *Ginther* hearing some seven months after defendant was sentenced, defendant was not able to identify this alleged witness, where this person might be, what this witness might have seen, or whether the witness would testify. Thus, defendant fails to establish the factual predicate for this claim of ineffective assistance.

We also reject defendant's claim that counsel was ineffective when counsel failed to subpoena his cellular telephone records. Defendant contends the records would have shown the complainant's cell phone number saved on defendant's phone list. Defendant argues this would have called into question her testimony that she had never seen defendant, which would have undermined her credibility in general. Defendant argues that if her credibility was thus undermined, the outcome of the case probably would have been different. There is nothing in the record before this Court, however, that indicates the phone records in fact exist or contain the information defendant alleges they contain. Therefore, defendant again fails to establish the factual predicate for his claim.

Defendant also argues that following the trial court's denial of his pretrial motion to admit other acts evidence, it became critical that he testify on his behalf. Defendant asserts that counsel's advice that defendant not testify constituted ineffective assistance of counsel. Again, we disagree. Defendant knowingly and voluntarily acknowledged in open court that it was his decision not to testify. Moreover, defendant cannot overcome the presumption that counsel's advice was sound trial strategy. See *Toma*, *supra* at 304. Defendant had a pending charge for domestic violence that could have come to light during cross-examination and damaged defendant's reputation and credibility. This Court will not assess counsel's legitimate trial strategy with the benefit of hindsight. See *People v Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (2000).

In any event, defendant is unable to establish the requite prejudice for his ineffective assistance claim due to the weight of the evidence presented.

V' Motion for New Trial or *Ginther* Hearing

Lastly, we reject the argument that the trial court abused its discretion in denying defendant's request for a *Ginther* hearing. See *People v Collins*, 239 Mich App 125, 138-139; 607 NW2d 760 (1999). A *Ginther* hearing would be warranted only if defendant is able to show a potentially meritorious ineffective assistance of counsel claim that required further development of the record. As on appeal, defendant failed to make such a showing below, offering only unsupported assertions that the alleged evidence would be relevant or helpful to his case.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

I concur in result only.

/s/ Helene N. White